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In the Supreme Court of the United States

OCTOBER TERM, 1934.

No. 208.

HERBERT H. WAXHAM, doing business as
WAXHAM HATCHERIES,
Petitioner,

vs.

SAMUEL B. SMITH
and the
BUCKEYE INCUBATOR COMPANY,
Respondents.

PETITION FOR IMMEDIATE MANDATE
and
AFFIDAVIT IN SUPPORT.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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PETITION FOR IMMEDIATE MANDATE.

Now comes the respondent, Samuel B. Smith, owner of the Smith patent No. 1,262,860, and petitions this Court for an immediate mandate to the Circuit Court of Appeals of the Ninth Circuit in this cause.

The reasons for granting the request are fully set forth in the affidavit of Albert L. Ely, filed herein, and present a state of facts in which it is essential to the enforcement of the patent and to prevent irreparable loss to the patentee, that the mandate be not delayed, but issue forthwith.

NEWTON D. BAKER,
ALBERT L. ELY.

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AFFIDAVIT OF ALBERT L. ELY.

STATE OF OHIO,
COUNTY OF CUYAHOGA, ss.

I am of counsel in the above entitled cause, and am familiar also with various other suits which have been brought by the plaintiff against users of Robbins Incubators in different parts of the country. Among these suits are the cases of *Smith v. Austin* and *Smith v. Fontana Farms Corporation,* both users of Robbins Incubators.

Both of these suits were filed in the Southern District of California, and are now pending before the Circuit Court of Appeals of the Ninth Circuit on motions for preliminary injunctions.

The defendants in those cases, and many other users of the Robbins Incubators, are continuing, in disregard of the ruling of this Court, to use the same incubators as were before this Court in the instant suit, or incubators which differ therefrom in immaterial and unimportant details. In this continued use the hatchery operators are encour-

aged by the manufacturer, Robbins, who defended the present case. The plaintiff has not sued the manufacturer, Robbins, or The Robbins Incubator Company, as investigations conducted by the plaintiff have shown that they are not financially responsible, and certainly unable to recompense the plaintiff for the damages resulting from the widespread use of the Robbins Incubators.

In connection with the *Austin* and *Fontana Farms* suits, referred to above, counsel for the defendants, who is the same as defended the *Waxham* case, and who has advised me that he is being employed by Robbins, has notified me, by way of affidavits filed in those cases, that he is now engaged in the preparation of petition for rehearing by this Court in the instant case. As a reason for delay in those cases referred to, counsel for defendants have called to the attention of the Circuit Court of Appeals of the Ninth Circuit the fact that the mandate in this case has not been issued.

In view of these facts it is essential to the proper enforcement of the Smith patent, which will expire on April 16, 1935, that the mandate in this case issue at the earliest possible moment. The hatching season has started in many parts of the country, including Southern California, and by February 1, 1935, will be in full swing over the entire country. Many of the users of the Robbins Incubators are known to be financially irresponsible, and if the mandate is delayed will be encouraged to carry on their infringing operations. If such be permitted, in many cases, the patentee may be unable to recover any damages for the infringing operations.

ALBERT L. ELY.

Sworn to and subscribed before me this 21st day of January, 1935.

HAZEL J. FAWCETT,

(Notarial Seal) *Notary Public.*

My commission expires April 16, 1936.

Cleveland, Ohio,
January 23, 1935.

HERBERT H. WAXHAM,
c/o Raymond Ives Blakeslee, Esq.,
Title Insurance Bldg.,
433 S. Spring St.,
Los Angeles, Calif.

DRURY W. COOPER, ESQ.,
Woolworth Bldg.,
New York, N. Y.

You are hereby notified that a Petition for Immediate Mandate, and Affidavit in support thereof, of Albert L. Ely, of which copies are herewith enclosed, has been filed in the office of the Clerk of the Supreme Court of the United States on the ~~25th~~ 23rd day of January, 1935 and that the same will be submitted to the Court on the 4th day of February, 1935, for its consideration, without argument.

ALBERT L. ELY.